88-336

Supreme Court, U.S.
FILED
AUG 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NORM F. HILLS, SUPT.,

Petitioner,

v.

ALBERT HUSTON FREELS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the two-part deficiency-prejudice standard of *Strickland v. Washington,* 466 U.S. 668 (1984), applies to claims of ineffective assistance of appellate counsel.

II. Whether the prejudice standard of *Strickland v. Washington,* 446 U.S. 668 (1984), applies to claims of ineffective assistance of appellate counsel based on noncompliance with the procedures set forth in *Anders v. California,* 386 U.S. 738 (1967).

PARTIES

The Petitioner in this action is Norm F. Hills in his capacity of Superintendent of the Pickaway Correctional Institution at Orient, Ohio.[1] The Respondent is Albert Huston Freels, a state prisoner.

[1] The original party having custody over Respondent was Arthur Tate, Jr., the Superintendent of the Chillicothe Correctional Institute at Chillicothe, Ohio. Petitioner was substituted as a party upon Respondent's transfer to Pickaway Correctional Institution. Petitioner notes that Respondent was released on parole on February 10, 1988 by the Ohio Adult Parole Authority.

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The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Freels v. Hills*, 843 F.2d 958 (6th Cir. 1988). (A-6). The July 28, 1986 decision of the United States District Court for the Southern District of Ohio, Eastern Division in Case No. C-2-86-0279 is unpublished and unreported. (A-19). The decision of the Ohio Court of Appeals for the First Appellate District is unpublished and unreported. (A-26).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was rendered on April 6, 1988. (A-6).

A petition for rehearing was timely filed on April 20, 1988. An order was issued on May 23, 1988 denying the petition for rehearing. (A-5).

Jurisdiction is conferred under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence.

and Section 1 of Amendment XIV to the Constitution of the United States:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

and Rule 11(C)(2)(a) of the Ohio Rules of Criminal Procedure:

(C) Pleas of Guilty and No Contest In Felony Cases

* * *

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NORM F. HILLS, SUPT.,
Petitioner,

v.

ALBERT HUSTON FREELS,
Respondent.

STATEMENT OF THE CASE

The instant case comes before this Court upon the petition of the State of Ohio for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in *Freels v. Hills,* 843 F.2d 958 (6th Cir. 1988). Therein the circuit court reversed the judgment of the district court denying a writ of habeas corpus and held that the failure of a defendant's appellate counsel to strictly conform to the requirements for filing an appellate brief set forth in *Anders v. California,* 386 U.S. 738 (1967), must be deemed presumptively prejudicial and is not to be measured by the deficiency-prejudice standards of *Strickland v. Washington,* 466 U.S. 668 (1984). The circuit court remanded the case to the district court to issue a writ of habeas corpus conditioned on the appointment of counsel to pursue a new appeal in conformity with *Anders.*

The facts of the case are these. Respondent was indicted on May 26, 1983 by the grand jury of Hamilton County, Ohio on one count of felonious assault in violation of Ohio Revised Code Section 2903.11(A)(2), in that he "knowingly caused or attempted to cause physical harm to George Psihountaais by means of a deadly weapon, to wit a knife." On July 14, 1983 Respondent attended a plea hearing in the Court of Common Pleas of Hamilton County, Ohio. Prior to the plea

hearing Respondent and defense counsel completed and signed a no contest plea form containing a statement of the charge, the minimum and maximum penalties, a statement of the effect of a no contest plea, the fact that the judge may proceed with judgment and sentence, a catalogue of the constitutional rights waived by entering the plea, and a statement that Respondent had been advised by counsel about these matters and knowingly and voluntarily entered the plea.

At the plea hearing the trial judge personally addressed Respondent. (Tr. 2-8). The court asked Respondent if he understood the charge of felonious assault. (Tr. 2). The court stated the maximum and minimum terms of imprisonment and fine. (Tr. 2). The court explained the effect of a plea of no contest, and that the court could proceed to impose sentence. (Tr. 2). The court informed Respondent that he had a right to plead not guilty, to require the State to prove each and every element of the offense beyond a reasonable doubt, to a trial by jury, to confront and cross-examine witnesses, to remain silent, and to compel the attendance of witnesses. (Tr. 2-4). The court questioned Respondent about the written plea he signed, whether the signature was his, whether he read it before he signed it, whether he discussed it with defense counsel, whether he understood his rights and what rights he was giving up, and whether he signed the plea of his own free will, to all of which Respondent answered in the affirmative. (Tr. 4-5). The court repeatedly and specifically inquired of Respondent whether he was voluntarily, freely, and independently withdrawing his plea of guilty and entering the plea of no contest. (Tr. 4, lines 5-9; 5, lines 1-25; 6, lines 1-15). The court asked Respondent if anyone had threatened him or made promises to him to enter the plea and if he had recently taken any drugs or alcohol. (Tr. 5). The court pointedly quizzed Respodnent whether he had reached the decision separately and independently of counsel. (Tr. 5-6). The court then heard the prosecutor relate the facts upon which the indictment was brought (Tr. 6-7) and allowed defense counsel to comment on the prosecutor's statement of the facts (Tr. 7-

8). The trial court then found Respondent guilty as charged. (Tr. 8).

The trial court did not pronounce sentence at that time, but ordered a pre-sentence investigation. (Tr. 8). On July 20, 1983 the court conducted a sentencing hearing, at which defense counsel addressed the court in mitigation. (Tr. 13-15). Respondent also was given the opportunity, and did, address the court. (Tr. 15). The trial court then sentenced Respondent to a term of two (2) to fifteen (15) years imprisonment. (Tr. 17).

Through new cousel Respondent filed an appeal to the Court of Appeals of Hamilton County, Ohio, First Appellate District. Appellate counsel, on October 6, 1983, filed a brief stating that after a review of the record he found no error prejudicial to Respondent but requesting the Court of Appeals to review the record independently to determine whether prejudicial error existed. Respondent then filed a *pro se* brief containing five assignments of error: (1) the court ignored a psychiatric evaluation in the pre-sentence investigation report; (2) the court did not sufficiently warn Respondent of the gravity of a plea change; (3) Respondent was erroneously charged with attempting to cause "serious" physical harm; (4) Respondent's employer was legally responsible for the actions of Respondent, the employee; and (5) the court failed to ask Respondent at the plea hearing if he was satisfied with defense counsel.

On April 4, 1984 the court of appeals issued its decision and judgment. (A-26). In its decision the court stated that it independently reviewed the record and found no prejudicial error or infringement of Respondent's constitutional rights.

On July 2, 1985 Respondent, through present counsel, filed a motion in the Court of Appeals for reconsideration and reinstatement of the appeal or for a new appeal. In that motion Respondent claimed that previous appellate counsel's "no merit" brief did not comply with *Anders v. California* and that Respondent was denied the effective assistance of counsel by appellate counsel's failing to raise a claim that

the trial court did not determine whether Respondent understood the nature of the charge. The motion was overruled on July 29, 1985.

Respondent sought leave to appeal in the Ohio Supreme Court. Respondent raised, as propositions of law, essentially the same two claims as were raised in his petition for a writ of habeas corpus. The Supreme Court denied leave to appeal on January 29, 1986.

On March 11, 1986 Respodnent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. In his petition Respondent alleged two grounds for relief: (1) ineffective assistance of counsel on appeal by counsel's filing a "no merit" brief not in compliance with *Anders v.California;* and (2) ineffective assistance of counsel on appeal by counsel's failure to assign as error the trial court's noncompliance with Rule 11(C)(2)(a) of the Ohio Rules of Criminal Procedure.

Petitioner filed a return of writ on May 1, 1986. In his return of writ Petitioner argued that Respondent had not exhausted available state remedies with respect to his habeas claims and that Respondent had shown neither a constitutionally deficient performance by appellate counsel nor any prejudice from the claimed violation.

On June 3, 1986 Respondent filed a traverse to Petitioner's return of writ. On July 28, 1986 the district court issued an opinion and order in which it found that Respondent had exhausted both of his grounds for relief but that Respodnent had failed to show prejudice — that had cousel filed a proper Anders' brief or raised the alleged Rule 11(C)(2)(a) error on appeal there was some probability that his conviction would have been reversed on appeal. (A-19). On that same date the district court entered judgment for Petitioner.

Respondent filed a motion to alter or amend judgment on August 7, 1986. The district court denied the motion by order of November 26, 1986. On December 24, 1986 Respondent filed a notice of appeal and a motion for a certificate of

probable cause. The district court granted a certificate of probable cause on January 13, 1987.

Following briefing and argument, the circuit court issued a decision reversing the district court judgment. *Freels v. Hills,* 843 F.2d 958 (6th Cir. 1988). (A-6). The circuit court determined that the district court erroneously applied the prejudice standard of *Strickland v. Washington,* 466 U.S. 668 (1984). The circuit court held that the failure of appellate counsel to strictly conform to the requirements for filing an appellate brief set forth in *Anders v. California,* 386 U.S. 738 (1967), must be deemed presumptively prejudicial. The court remanded the case to the district court to issue a conditional writ of habeas corpus providing Respondent a new appeal in conformance with the procedures mandated by *Anders.*

On April 20, 1988 Petitioner petitioned the circuit court for rehearing, rehearing *en banc,* and moved for stay of the mandate. On May 23, 1988 the circuit court denied rehearing. (A-5). The circuit court's decision was issued as mandate on June 1, 1988. (A-3). On July 13, 1988 Petitioner moved for recall of the mandate. The court recalled the mandate on July 27, 1988. (A-2).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

This case presents the question of what standard governs the review of a claim of ineffective assistance of appellate counsel arising out of noncompliance with the procedures established in *Anders v. California,* 386 U.S. 738 (1967). Specifically, is such a claim to be judged by the prejudice standard of *Strickland v. Washington,* 466 U.S. 688 (1984), or does noncompliance with the *Anders* procedures automatically require that prejudice be presumed?

In the state courts and in his habeas corpus petition, Respondent claimed that he was denied the effective assistance of appellate counsel by reason of appellate counsel's noncompliance with the *Anders* procedures. The district court applied the *Strickland* standards and found that Respondent was not denied the effective assistance of counsel on appeal because he was not prejudiced by any deficiency of appellate counsel. (A-19). The circuit court reversed the district court and held that the district court erroneously applied the *Strickland* prejudice standard. The circuit court held that prejudice must be presumed when counsel has not strictly — or at least substantially — complied with the *Anders* procedures.

The difference here between the district court and the circuit court reflects a broader conflict among the circuits as to the applicability of the prejudice standard in the context of noncompliance with *Anders.* The Tenth Circuit in *Griffin v. West,* 791 F.2d 1578 (10th Cir. 1986), held that the *Strickland* standards control a claim of noncompliance with *Anders* and found no prejudice from the failure of appellate counsel to file a brief. *Id.* at 1582. In *Lockhart v. McCotter,* 782 F.2d 1275 (5th Cir. 1986), *cert. denied,* 107 S. Ct. 873, *reh'g denied,* 107 S. Ct. 1360 (1987), the Fifth Circuit evaluated a claim of ineffective assistance of appellate counsel using the two-part deficiency-prejudice test. While agreeing that counsel was deficient in filing only a no-merit affidavit, the circuit court found that the petitioner was not prejudiced because he failed to demonstrate a reasonable probability that the result of his appeal would have been different. *Id.* at 1283.

In *Gulliver v. Dalsheim,* 739 F.2d 104 (2nd Cir. 1984), the Second Circuit held that the *Strickland* standards govern claims of ineffective assistance of appellate counsel, but reversed the district court's finding that appellate counsel's representation failed to meet the *Anders* guidelines. *Id.* at 107-108.

On the other hand, the Second Circuit more recently has held that the *Strickland* standards are inapplicable where appointed counsel filed an inadequate brief and was removed before the petitioner's appeal was submitted for decision and no replacement was ever assigned. *Jenkins v. Coombe,* 821 F.2d 158 (2nd Cir. 1987), *cert. denied,* 108 S. Ct. 704 (1988). There, the circuit court concluded that the petitioner "had no counsel or, at best, nominal counsel." *Id.* at 161. Likewise, the Eighth Circuit in *Robinson v. Black,* 812 F.2d 1084 (8th Cir. 1987), held that a petitioner was denied effective assistance of counsel where appointed counsel withdrew and the petitioner was required to proceed *pro se.* Without specifically addressing the question of prejudice, the court found that counsel's assistance constituted ineffectiveness where the brief submitted by counsel before withdrawal analyzed all of the claims his client could possibly raise on appeal and concluded that all were meritless. The court concluded that this brief did not comport with *Anders. Id.* at 1085-1087.[1] In *Mylar v. State of Alabama,* 671 F.2d 1299 (11th Cir. 1982), *cert. denied,* 463 U.S. 1229 (1983), the Eleventh Circuit, in a decision pre-dating this Court's decision in *Strickland,* found that the failure to file an appellate brief, even where permitted by state rule, constituted ineffectiveness in light of *Anders.* The court was silent as to prejudice. However, two years later, the same circuit held that the failure to file a brief on appeal is ineffective assistance, and expressly held that no prejudice need be found. *Cannon v. Berry,* 727 F.2d 1020, 1022 (11th Cir. 1984). Finally, in *High*

[1] A petition for a writ of certiorari to review the decision of the Eighth Circuit, presenting the same questions as are presented in this petition, is now pending in this Court. *Black v. Robinson,* 56 U.S.L.W. 3198 (U.S. Sept. 29, 1987) (No. 87-211).

v. Rhay, 519 F.2d 109 (9th Cir. 1975), the Ninth Circuit found that an inadequate *Anders* brief required the granting of a new appeal. *Id.* at 113.

In the context of this conflict concerning the appropriate standard of review, the instant case presents a set of facts somewhat different from that faced by the circuits in the foregoing cases. The Sixth Circuit itself characterized the state court record here as "very abbreviated and uncontroverted." (A-17). The state trial court record consists of a total of 21 pages: indictment, no contest plea form, transcript of plea and sentencing, and judgment entry. Thus, Respondent's original appellate counsel had an exceedingly simple case and a remarkably scant record from which to find anything that might support the appeal.

Moreover, after the state court of appeals rendered its decision affirming the conviction, and after Respondent's original appellate counsel was replaced by Respondent's present counsel, that counsel advanced only one claim from the state trial court record. That claim, a state-law claim, alleged that the trial court failed to comply with Rule 11(C)(2)(a) of the Ohio Rules of Criminal Procedure by determining that Respondent understood the nature of the charge. As the district court noted in its decision, Respondent "made no allegations that he, in fact, did not understand the nature of the charge with which he was indicted." (A-24). This lone state-law claim was unsuccessfully presented by present counsel to both the state court of appeals and the Ohio Supreme Court. The district court noted that the state appellate courts rejected Respondent's claim of error in the plea-taking procedures and it concluded that there was no absence of fundamental fairness. (A-25). The circuit court itself took no issue with that conclusion:

> However competent court-appointed counsel might be generally, and however reasonable our court or the state court might find his conclusion that the record was *devoid of error,* such a finding is not an adequate substitute for the *procedures*

> which *Anders* prescribes to be followed in such circumstances. (Emphasis added).

(A-15 to A-16). The difficulty with this reasoning, and with the granting of the writ in this case, and ultimately with the circuit court's rejection of the *Strickland* standards in the *Anders* context, is that it places form over substance. In *Strickland* this Court, in the course of defining standards for ineffectiveness of counsel, stated:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Id. at 686. (Emphasis added). In holding that Respondent's case must be remanded for reinstatement of his appeal — in spite of the fact that the record is devoid of error — the circuit court ignored the *results* which the *Anders* procedures were designed to achieve in deference to the *procedures* themselves. The circuit court, in essence, held that noncompliance with the *Anders* procedures constitutes a denial of counsel. Cf. *Strickland v. Washington,* 466 U.S. at 692; *United States v. Cronic,* 466 U.S. 648, 658-659 (1984).

However, when this Court, in *Evitts v. Lucey,* 469 U.S. 387 (1985), held that an appellant has the right to the effective assistance of counsel on appeal in the first appeal as of right, the Court expressly left undecided the question of the appropriate standards for evaluating claims of ineffective assistance of appellate counsel. *Id.* at 392. The Court did not suggest that *Anders* established such a standard. Very recently, this Court cogently stated the purpose of the *Anders* procedures:

> In *Anders* we held that a motion to withdraw must be accompanied by "a brief referring to anything in the record that might arguably support the appeal." 386 U.S., at 744. That requirement was designed to provide the appellate courts with a

> basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability. The *Anders* requirement assures that indigent defendants have the benefit of what wealthy defendants are able to acquire by purchase — a diligent and thorough review of the record and an identification of any arguable issues revealed by that review. Thus, the *Anders* brief assists the Court in making the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw.

McCoy v. Court of Appeals of Wisconsin, District 1, ____ U.S. ____, 108 S. Ct. 1895, 1902, 100 L. Ed.2d 440, 454 (1988). Thus, the *Anders* procedures are not an end in and of themselves, as the result of the circuit court's decision would suggest, but rather a means by which an appellate court can determine whether an appeal should be dismissed as frivolous or reviewed for a determination on the merits.

The present case illustrates why a claim of failure to comply with *Anders* procedures should not be deemed presumptively prejudicial but should be judged by the *Strickland* prejudice standard. As noted above, Respondent, through present counsel, has advanced a single claim of error in the trial court's plea-taking procedure. The key element in the *Anders* procedures, as expressed by this Court in *McCoy, supra,* is the provision that counsel's brief should refer to anything in the record that might support the appeal. 386 U.S. at 744. Although Respondent's present counsel was able to advance a claim, it was not unreasonable for Respondent's original appellate counsel to be unable to do so. Because of the nature of the case and due to the "very abbreviated and uncontroverted" state of the trial court record, counsel cannot be faulted for not finding a claim to support the appeal. The circuit court, as quoted above, did not find it unreasonable that counsel found the record to be "devoid of error." Thus, counsel's noncompliance with the *Anders* requirement that the brief refer to anything in the record arguably supporting the appeal was due to his understandable inability to comply.

This fact makes the circuit court's granting of the writ in this case highly anomalous. As expressed in the concluding paragraph of its opinion (A-18), the circuit court did not find any error in the trial court's plea-taking procedures — which was, in fact, precisely *the* error Respondent claims his original appellate counsel was ineffective for failing to raise. But the court did conclude that counsel was ineffective in failing to comply with *Anders* by not filing a brief presumably raising this same claim of error.

This and other cases in which counsel are claimed to have rendered ineffective assistance through noncompliance with the *Anders* procedures show why such a claim should not carry a presumption of prejudice but should be reviewed under the prejudice standard of *Strickland v. Washington.* The contrary rule would require the state courts to go through the process of re-reviewing cases already reliably determined to be devoid of error. This process cannot produce a more reliable or just result.

While Petitioner recognizes the wisdom of *Anders* and concedes that, as with other procedures designed to protect constitutional rights, appellate counsel may need to be admonished to follow *Anders,* he respectfully submits that the purposes of *Anders* are not served by presuming prejudice where prejudice is so plainly lacking. The courts will enforce compliance with the *Anders* procedures in order to avoid the easily avoidable claims of ineffective assistance of counsel based on noncompliance with *Anders.* Therefore, the fear of erosion of the *Anders* requirements by application of a prejudice standard of review is unwarranted. The Sixth Circuit has applied the *Strickland* deficiency-prejudice standards to claims of ineffective assistance of appellate counsel outside of the *Anders* context. *Bowen v. Foltz,* 763 F.2d 191 (6th Cir. 1985). There is no compelling reason to distinguish claims of *Anders* violations from other claims of ineffectiveness of appellate counsel subject to the *Strickland* standards.

CONCLUSION

A writ of certiorari should therefore be issued to review the decision of the United States Court of Appeals for the Sixth Circuit, to resolve the conflict among the federal circuits, and to clarify whether the standards of *Strickland v. Washington* apply to claims of ineffective assistance of appellate counsel based on noncomformance with the procedures of *Anders*.

Respectfully submitted,

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APPENDIX

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No. 87-3016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT HUSTON FREELS, *Petitioner-Appellant,*	:	
v.	:	ORDER
NORM F. HILLS, *Respondent-Appellee.*	:	Filed July 27, 1988 [File stamp deleted]

Upon consideration of the appellee's motion to recall the mandate,

IT IS ORDERED that the motion be, and it hereby is, GRANTED and the mandate is recalled.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-3016

ALBERT HUSTON FREELS,

Petitioner-Appellant,

v.

NORM F. HILLS, Superintendent,

Respondent-Appellee.

Before: ENGEL, Chief Judge*; MERRITT and RYAN, Circuit Judges.

JUDGMENT
Filed April 6, 1988
[File stamp deleted]

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed and the case is remanded with instructions consistent with this opinion.

No costs taxed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ John P. Hehman
Clerk

*The Honorable Albert Engel assumed the duties of Chief Judge effective April 1, 1988.

Issued as Mandate: June 1, 1988 A True Copy.

COSTS: None Attest:

Filing fee . . . . . $
Printing . . . . . $

/s/ Gary A. McCarthy
Deputy Clerk

Total . . . . . $

No. 87-3016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT HUSTON FREELS, *Petitioner-Appellant,*	)	
v.	)	ORDER
NORM F. HILLS, SUPT., *Respondent-Appellee*	)	Filed May 23, 1988 [File Stamp deleted]

BEFORE: ENGEL, Chief Judge, MERRITT and RYAN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

John P. Hehman, Clerk

No. 87-3016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT HUSTON FREELS,	)	
	)	
Petitioner-Appellant,	)	On Appeal from the
	)	United States District
v.	)	Court for the Southern
	)	District of Ohio
NORM F. HILLS, SUPT.,	)	
	)	
Respondent-Appellee.	)	

Decided and Filed April 6, 1988

Before: ENGEL, Chief Judge;* MERRITT and RYAN, Circuit Judges.

ENGEL, Chief Judge. This appeal from the denial of a writ of habeas corpus requires us to determine, for the first time in this circuit at least, whether failure by defendant's appellate counsel strictly to conform to the requirements for filing an appellate brief set forth in *Anders v. California,* 386 U.S. 738 (1967), must be deemed presumptively prejudicial or whether such conduct is to be measured by the standards of *Strickland v. Washington,* 466 U.S. 668 (1984), and *United States v. Cronic,* 466 U.S. 648 (1984).

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*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

The facts are relatively simple. On July 14, 1983, Freels pleaded no contest to a charge of felonious assault in the Hamilton County Court of Common Pleas. He was found guilty and sentenced to a term of two to fifteen years. Freels chose to appeal his conviction and new counsel was appointed to represent him. Counsel filed a four page brief in which he reviewed the procedural history of the case, concluded that the trial court had committed no errors, and asked the appellate court to review the record to ensure that he did not miss anything. In contrast, Freels submitted a pro se brief raising five assignments of error: (1) The trial court ignored a psychiatric evaluation in the pre-sentence investigation report; (2) the trial court did not sufficiently warn appellant of the gravity of a plea change; (3) appellant was erroneously charged with attempting to cause "serious" physical harm; (4) appellant's employer was legally responsible for the actions of appellant, the employee; and (5) the trial court failed to ask appellant at the plea hearing if he was satisified with defense counsel. Despite his objections, Freels' conviction was affirmed on April 4, 1984 by the First Appellate District Court, Hamilton County, which held that "there were reasonable grounds for this appeal" and thus imposed no penalty against Freels. At the same time it concluded "that the record of the proceeding below contains no demonstrative evidence of error prejudicial to appellant's rights." Freels completed the exhaustion of his state court remedies when the Ohio Supreme Court denied his motion for leave to appeal.

On February 24, 1986, Freels filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Southern District of Ohio.

He claimed that he had been denied the effective assistance of appellate counsel in violation of the Due Process Clause of the fourteenth amendment. More specifically, Freels claimed that his counsel was ineffective in failing to present the argument that Ohio Criminal Rule 11(C)(2)(a) had been violated.[1] The record shows that while the trial judge did cover most of the requirements with Freels, he failed specifically to discuss the elements of felonious assault with defendant as required by the rule.

On review of Freels' petition the district judge applied the deficient counsel standard enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), to Freels' case and denied the writ. Under that standard[2] the district court found that since Freels had made no showing that he had been

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[1] Rule 11(C)(2)(a) states:

(C) Pleas of guilty and no contest in felony cases.

. . . .

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

[2] The standard set forth in *Strickland* is:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

prejudiced by his counsel's alleged inadequate conduct, there was no need to decide whether counsel's conduct was, in fact, deficient. Freels appealed the district court judgment.

Because all states now have well established statutory procedures for direct appeals of criminal conviction, it is not difficult to forget that a state is not required by the federal Constitution to provide appellate courts or a right to appellate review at all. Indeed, "whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself." *McKane v. Durston,* 153 U.S. 684, 688 (1894). Once, however, a state does grant appellate review, the Consitution steps in to assure that the right so conferred by the state is conferred without discrimination:

> But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.
>
> All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (footnotes and citations omitted).

The Court has also held that the sixth amendment right to trial counsel applies to the states through the fourteenth amendment. *Gideon v. Wainwright,* 372 U.S. 335 (1963). The sixth amendment guarantee was further extended in *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980), to include not only the right to counsel, but the right to effective assistance of counsel. Most recently, in *Evitts v. Lucey,* 469 U.S. 387 (1985), the Court merged the *Cuyler* line of cases with the right to counsel on first appeal set forth in *Douglas v. California,* 372 U.S. 353 (1963), and held that the sixth amendment guarantees a criminal appellant effective assistance of counsel on his first appeal as of right. The Court in *Evitts* traced the history of the continuing concerns for the right to effective assistance:

> Just as a transcript may by rule or custom be a prerequisite to appellate review, the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits. See *Griffin, supra,* at 20. Therefore, *Douglas v.California, supra,* recognized that the principles of Griffin required a State that afforded a right of appeal to make that appeal more than a "meaningless ritual" by supplying an indigent appellant in a criminal case with an attorney. 372 U.S. at 358. This right to counsel is limited to the first appeal as of right, see *Ross v. Moffitt,* 417 U.S. 600 (1974), and the attorney need not advance *every* argument, regardless of merit, urged by the appellant, see *Jones v. Barnes,* 463 U.S. 745 (1983). But the attorney must be available to assist in preparing and submitting a brief to the appellate court, *Swenson v. Bosler,* 386 U.S. 258 (1967) (*per curiam*), and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. See

Anders v. California, 386 U.S. 738 (1967); see also *Entsminger v. Iowa,* 386 U.S. 748 (1967).

469 U.S. at 393-94.

In *Anders v. California,* 386 U.S. 738 (1967), the Supreme Court considered the dilemma facing a court-appointed appellate counsel required to prosecute a first appeal from a criminal conviction when his own conscientious examination of the record revealed no merit in the appeal. To reconcile the right of an indigent defendant to counsel who will vigorously and fairly advocate his rights on appeal with the ethical strictures upon counsel generally to advance on behalf of a client only those issues which such counsel honestly believes fairly debatable under the law, the Court, speaking through Justice Clark, established a procedure which it expected would be compatible with both interests and would avoid the unseemly demand that appellate counsel pursue frivolous and non-meritorious claims:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court - not counsel - then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly

> frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. at 744 (footnote omitted).[3]

While the Supreme Court in *Anders* did set forth guidelines for appellate counsel when that counsel believes there is no merit to defendant's appeal, the court did not provide guidance for determining what degree of non-compliance with *Anders* requirements might necessitate reversal. More insight into the matter was provided in a subsequent case, *Strickland v. Washington*, 466 U.S. 668 (1984). There the Court held that an error by counsel, even if unreasonable, generally does not warrant setting aside the judgment of the criminal proceeding if the error has no effect on the judgment. Prejudice is only presumed if defendant is denied the actual or constructive assistance of counsel or if counsel has a conflict of interest. In all other cases, counsel is simply

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[3] Sixth Circuit Rule 12(d)(3) governs the filing of *Anders* briefs in this circuit.

> (d) Withdrawal of Appellate Counsel. A motion to withdraw as cousel on appeal in a criminal case must state the reasons for such relief and be accompanied by one of the following:
>
> . . . .
>
> (3) A brief following the procedure described in *Anders v. California*, 386 U.S. 738 (1967). Counsel shall serve a copy of the brief and motion on the defendant and advise the defendat that the defendant has twenty-one (21) days from the date of service in which to file a brief in support of reversal of the conviction. Such a motion must be accompanied by proof of service on the defendant.

considered "deficient" and defendant must show both that counsel's deficiencies fall outside the "wide range of professionally competent assistance," and that absent the attorney's errors, the factfinder would have reasonable doubt respecting guilt of the defendant. *Id.* at 690. In fact, in determining whether the judgment must be set aside, the standards in *Strickland* are not unlike those set forth in *Chapman v. California,* 386 U.S. 18 (1967). In *Chapman* the Supreme Court recognized that although certain errors of constitutional dimension may intrude into criminal trials, they do not invariably affect the result. The Court concluded that in most cases these errors may properly be ignored if it can be determined that they are "harmless beyond a reasonable doubt" and do not affect the outcome of the case. *Id.* at 22.

Both *Chapman* and *Strickland* note that certain types of error can never be harmless when they involve the outright deprivation or denial of the right to counsel where otherwise constitutionally mandated. Thus, while *Chapman* recognizes that certain trial errors, though working constitutional harm, can nonetheless be held to be harmless if the court is able to declare its belief that such error was "harmless beyond a reasonable doubt," 386 U.S. at 21-24. *Chapman* also acknowledges, albeit somewhat cryptically, that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23 (citing *Fahy v. Connecticut,* 375 U.S. 85 (1963)). *See* also *Chapman,* 386 U.S. at 23 n.8 (citing *Payne v. Arkansas,* 356 U.S. 560 (1958) (coerced confession); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (right to counsel); *Tumey v. Ohio,* 273 U.S. 510 (1927) (impartial judge)). The Court reached a similar conclusion in *Strickland.* Although the Supreme Court held that not all unreasonable conduct amounting to incompetence of counsel inevitably commands reversal, it nonetheless recognized that:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various

> kinds of state interference with counsel's assistance. See *United States v. Cronic, ante* at 659, and n.25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. *Ante,* at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

Strickland, 466 U.8 at 692.

Upon review of the record here it is altogether evident that the mandates of *Anders* have not been followed. While Freels' court-appointed appellate counsel represented to the court that he had reviewed the transcript and found no error, we do not know from the record before us whether he consulted with or sought the advice of Freels himself or even whether he gave any notice of his intention to file such a brief. Certainly the "brief" submitted by counsel did not refer to any of the claims of error alleged by Freels in the latter's own brief, nor do we know upon the record before us whether counsel was even aware of those claims or had consulted his client concerning them. As close as counsel's brief comes to advocacy is the unsupported representation that "upon careful review of the docket and transcript, [he] concludes that the trial court committed no error prejudicial to the defendant." In short, we are wholly unable to find that court-appointed counsel for Freels did more than or indeed even as much as was done by court-appointed counsel in *Anders.* In *Anders* it at least appears that appointed counsel represented to the appellate court that he had visited and explained his views and opinions to Mr. Anders and subsequently notified the court of appeals that Anders wished to file a brief on his own behalf. *Anders,* 386 U.S. at 739. Even this amount of effort was found insufficient to fulfill the constitutional mandate in *Anders,* for the Court there emphasized that counsel's bare no-merit conclusion was not an adequate substitute for the petitioner's right to full appellate review. As the Court specifically held:

> Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity. The necessity for counsel so acting is highlighted by the possible disadvantage the petitioner suffered here. In his *pro se* brief, which was filed in 1959, he urged several trial errors but failed to raise the point that both the judge and the prosecutor had commented to the jury regarding petitioner's failure to testify.

Id. at 743.

In reviewing Freels' petition for a writ of habeas corpus, however, the district court applied the *Strickland* deficient counsel standard and concluded that although Freels' counsel may have violated certain *Anders* requirements, no prejudice or injury to Freels resulted and thus any error was harmless. Based on the district court opinion and a similar argument presented by the government before us on appeal, we are left to consider whether the deficient counsel standard set forth in *Strickland* can be applied to excuse the failure of court-appointed counsel to comply with the more specific commands of *Anders*. While we do not dismiss the possibility that some form of non-compliance, merely technical in nature, might be overlooked if it could be said that there was substantial although not exact compliance, we certainly cannot find that element here.

Normally, we believe that the obligation of advocacy required of counsel by *Anders* is of such a quality that it is not subject to waiver or excuse. However competent court-appointed counsel might be generally,[4] and however reasonable our court or the state court might find his conclusion that the record was devoid of error, such a finding

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[4] See our court's decisions in *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1975), and *United States v. Goodwin*, 531 F.2d 347 (6th Cir. 1976).

is not an adequate substitute for the procedures which *Anders* prescribes to be followed in such circumstances. This includes a specific determination by appellate counsel that the record is devoid of error and that the issues suggested by his client are frivolous, although the question of frivolity will ultimately be decided by the state appellate court. Further, in connection with such a finding, *Anders* requires that counsel file a brief referring to anything in the record arguably supporting defendant's appeal, furnish a copy of this brief to the indigent, and thereafter seek to be relieved of his duties. This would allow the state appeals court, if it disagrees, to provide for a substitution of counsel who would fairly represent defendant and who might be more sympathetic to the issues raised by him. On the other hand, if the court agrees with defense counsel, it may forego such appointment and substitute in its place its own careful review of the record, in light of the issues pointed out by the defendant or by the counsel seeking to withdraw. Appellate counsel here did not seek to withdraw but instead simply filed a no-merit letter, which was purportedly in compliance with an unreported decision of the Ohio Court of Appeals. *State v. Childress,* No. C-76503,slip op. (1st App. Dist. Ohio Nov. 23, 1977).

In short, it is evident that there has been a substantial non-compliance with *Anders* in nearly all respects. We need not therefore concern ourselves further, under facts not present here, whether some mere technical deficiency might safely be ignored.

Neither state appellate counsel nor the Ohio Court of Appeals made any reference to *Anders* in the direct appeal from Freels' plea of no contest. It is our observation that Freels' case is unfortunately not unique and that the advantages and requirements of *Anders,* although straightforward, are often ignored. We do not doubt that this may simply be due to an unawareness of *Anders,* and the absence of any reference to the case by Freels' counsel or the state appellate court, leads us to believe that this may have been the explanation here. A more common explanation, perhaps, is that court-appointed counsel,

although aware of *Anders*, simply concludes that it is easier and safer not to seek withdrawal from a case but instead to file a brief advancing grounds for appeal which counsel may privately feel are totally unwarranted and frivolous. Where this occurs, it is altogether likely that counsel, weighing the unpleasant alternatives, would rather risk judicial rebuke for raising issues which are not honestly debatable than risk the alternative and more costly danger that in failing to do so, he or she may become liable to a suit for malpractice or for obloquy resulting from a charge of incompetence. The choice is both difficult and real, we recognize, but it is also true that very often what may seem frivolous or unsupportable to counsel may seem otherwise in the eyes of the client or the appellate court. Thus, we commend a continued compliance with the requirements of *Anders* where appellate counsel concludes that he cannot fairly serve as advocate for his client. Similarly, we believe that appellate courts have a duty to recognize not only the dilemma faced by counsel, but also their own responsibility to insure that indigents are adequately represented, a right which is guaranteed by *Anders*.

The government nevertheless urges us to consider the facts specific to Freels' case: "The brevity of the record . . . and the lack of any errors in the plea hearing apparent to appellate counsel, the State Court of Appeals or the Court below, brings into question the strict application of *Anders* here." Although it might be easy for us to conclude that, faced with a very abbreviated and uncontroverted record, both Freels' counsel and the Ohio Court of Appeals committed no error,[5] we believe that the absence of any evidence of advocacy in the role of appellate counsel presumptively places such a conclusion in serious doubt and vindicates the wisdom of *Anders*. We recognize that even the terms "harmless beyond a reasonable doubt," not

[5] But we note that in its per curiam determining that the record contained no demonstrative error or error prejudicial to the appellant's rights, the court of appeals nonetheless "being of the opinion that there were reasonable grounds for this appeal, allowed no penalty." *State v. Freels*, No. C-830585, slip op. (1st App. Dist. Ohio April 4, 1984).

"honestly debatable under law," and "frivolous" can be viewed in many different ways. In each circumstance, however, the mere definition of the terms requires that no substantial and viable issues be apparent on an appellate review of the record. If we were to allow the absence of viable issues on appeal to serve as an excuse for counsel's failure to follow the mandates of *Anders*, we would be effectively erasing Anders from the books altogether.

In holding that petitioner was denied the right to effective assistance of appellate counsel as defined in *Anders* we do not infer that there was in fact any error in the plea taking procedures themselves. It is therefore not necessary to vacate the plea or to accord Freels the opportunity to withdraw it. The constitutional violation at issue here occurred on appeal of the plea, after it was taken, and thus affects only the guaranteed right to counsel on appeal. The remedy therefore is confined to guaranteeing Freels that which he has been denied. Accordingly, the judgment of the district court is REVERSED and the cause is REMANDED with instructions to issue a conditional writ of habeas corpus unless the petitioner shall be accorded, within a reasonable time, the right to counsel, court-appointed if petitioner is then indigent. Counsel is thereafter empowered either to perfect an appeal or, if his independent examination of the record so indicates, to follow the procedures specifically mandated by *Anders*.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALBERT HUSTON FREELS,	:	
Petitioner,	:	
v.	:	Civil Action C-2-86-0279 Filed July 28, 1986
ARTHUR TATE,	:	[File stamp deleted]
Respondent.	:	

OPINION AND ORDER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus under the provisions of 28 U.S.C. Section 2254. This matter is before the Court on the petition, return of writ, and the briefs and exhibits of the parties.

Petitioner was indicted by the May 1983 Term of the Hamilton County, Ohio Grand Jury on one (1) count of felonious assault in violation of Section 2903.11(A)(2), Ohio Revised Code. Petitioner plead no contest to the charge on July 14, 1983. The Court found petitioner guilty of felonious assault and sentenced him to a term of two (2) to fifteen (15) years imprisonment.

Petitioner appealed his conviction to the Court of Appeals for the First Appellate District. On appeal, counsel for petitioner stated that he did not find any prejudicial errors in the record of trial court proceedings.

Petitioner then filed a *pro se* brief with the Court of Appeals for the First Appellate District alleging the following as error:

(1) trial court did not get a psychiatric evaluation

(2) trial court did not sufficiently instruct him as to gravity of change in plea

(3) petitioner was improperly charged and convicted of felonious assault

(4) trial court failed to ask him if he was satisfied with counsel.

After independently reviewing the record, the appellate court affirmed the trial court's conviction. The Court of Appeals did not address the errors raised in petitioner's pro se brief. Petitioner also filed a Motion for Reconsideration and Reinstatement of Appeal, or Alternatively, for a New Appeal, which was denied on July 29, 1985. In his motion, he raised the following grounds:

> Appellate counsel's failure to comply with *Anders v. California,* 386 U.S. 738 (1967), and failure to comply with Ohio Criminal Rule 11(c)(2)(a) denied Freels the effective assistance of counsel on appeal.

Petitioner appealed the denial fo the Ohio Supreme Court. Leave to appeal was denied on November 27, 1985.

Petitioner filed a Notice of Appeal to the Ohio Supreme Court on October 31, 1985 alleging the following propositions of law:

(I) A defendant is denied the effective assistance of counsel on appeal where appellate counsel files an "Anders' Brief" which does not comply with *Anders v. California,* 386 U.S. 738 (1967).

(II) Appellate counsel's failure to assign as error the trial court's non compliance with Criminal Rule 11(c)(2)(3) constitutes ineffective assistance of appellate counsel.

The Supreme Court of Ohio *sua sponte* dismissed the appeal for lack of a substantial constitutional question.

Petitioner is presently before this Court upon a petition for writ of habeas corpus alleging that he is in custody of respondent in violation of the Constitution of the United States for the following reasons:

(1) Denial of effective assistance of counsel on appeal guaranteed by the Due Process of the Fourteenth Amendment by counsel's filing of "no merit brief" which did not comply with *Anders v. California,* 386 U.S. 738 (1967).

(2) Denial of Fourteenth Amendment right to effective assistance of counsel on appeal by counsel's failure to assign as error the trial court's non compliance with Ohio Criminal Rule 11(c)(2)(a).

Respondent states that petitioner's claim of ineffective assistance of counsel on appeal is not exhausted. Respondent states that while petitioner failed to raise this issue in the Court of Appeals, he still has the available state court remedy of a post-conviction action pursuant to Ohio Revised Code Section 2953.21, *et seq.*

A state prisoner must fairly present all of his constitutinoal claims for relief to the appropriate state courts before he may seek redress by way of federal habeas corpus. *Picard v. Connor,* 404 U.S. 270, 275-6 (1971); 28 U.S.C. Section 2254(b),(c). Where more than one state remedy is available to a defendant, exhaustion of one of those alternatives is all that is required. *Keener v. Ridenour,* 594 F.2d 581, 584 (6th Cir. 1979). It is not necessary to present the same claim in both state appellate and post-conviction proceedings. 594 F.2d at 584.

Petitioner has "fairly presented" his claims to the state courts. Because the state appellate courts have addressed the issues raised in the present petition when ruling on petitioner's Motion for Reconsideration and Reinstatement of Appeal or Alternatively, for a New Appeal, petitioner need not pursue a state post-conviction action prior to filing in

federal court. Having exhausted his state court remedies, this Court will address the merits of petitioner's claims.

Both of petitioner's claims in the case at bar allege ineffective assistance of counsel on appeal. In his first claim, petitioner states that counsel filed a brief on appeal that did not comply with *Anders v. California,* 386 U.S. 738 (1967). With respect to this claim petitioner states:

> Counsel who represented Freels on his direct appeal filed a four page "brief" alleging no errors and presenting no argument. The "brief" consisted of a statement of the case and a conclusion. Counsel stated in the "brief" that "the trial court committed no error prejudicial to the defendant." Also, the "brief" was not accompanied by a motion to withdraw. Freels' conviction was affirmed by the Court of Appeals despite the fact counsel's brief did not refer to anything in the record that might arguably support the appeal.

In his second claim, petitioner challenges counsel's failure to assign as error the trial court's non compliance with Ohio Criminal Rule 11(C)(2)(a). With respect to this claim petitioner states:

> When Freels entered his no contest plea, the trial court did not address him and determine that he was making the plea with an understanding of the nature of the charge as required by Criminal Rule 11(C)(2)(a) and the Due Process Clause of the Fourteenth Amendment. Prior to accepting his plea, the trial court neither explained nor apprised Freels of the nature of the charge. The trial record simply does not reflect that Freels understood the nature of the charge to which he plead. Appellate counsel failed to assign this as error on direct appeal and consequently the Court of Appeals did not address it before affirming his conviction.

An appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. *Evitts v. Lucey,* 469 U.S. ____, 53 U.S.L.W. 4101 (1985). The Supreme Court has explicitly declined to decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel. *Evitts v. Lucey,* 469 U.S. ____, 53 U.S.L.W. 4101 (1985). The Sixth Circuit Court of Appeals, however, has applied the *Strickland v. Washington,* 466 U.S. 668 (1985) standards for ineffective assistance of trial counsel standard in cases questioning the effectiveness of appellate counsel. *Bowen v. Foltz,* 763 F.2d 191, 194 (6th Cir. 1985).

The standard for determining whether counsel's assistance was ineffective under the 6th Amendment is twofold: Under *Strickland v. Washington,* 466 U.S. 668 (1984), for counsel's assistance to have been ineffective, it must have been both deficient and prejudicial to the petitioner. To establish deficient performance under *Strickland,* the petitioner must show that the counsel's representation fell below an objective standard of reasonableness, the proper measure of reasonableness being the prevailing professional norms. Under Strickland, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Reasonableness is determined on a case-by-case basis as of the time of the challenged conduct. *Strickland v. Washington,* 466 U.S.668, 669 (1984).

Petitioner must also affirmatively show that the deficient performance of counsel prejudiced the defense. This requirement is satisfied by the defendant affirmatively showing there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. at 694 (1984). A reasonable probability is one sufficient to undermine confidence in the outcome. *Strickland v. Washington,* 466 U.S. at 694 (1984). If sufficient prejudice has not been shown, the Court need not determine whether counsel's performance was deficient. *Strickland v. Washington,* 466 U.S. at 697 (1984).

The principles enunciated in *Strickland* do not establish mechanical rules. Rather, these principles should serve as a guide in the decisionmaking process with the ultimate inquiry being the fundamental fairness of the proceeding whose result is being challenged. *Strickland v. Washington,* 466 U.S. at 696 (1984). The critical issue on an appeal as of right is whether there has been a correct adjudication of guilt in every case. *Gilbert v. Sowders,* 696 F.2d 1146, 1150 (6th Cir. 1981).

In the case at bar petitioner's claim of ineffectiveness of counsel is based on counsel's failure to file an *Anders* brief, and his failure to allege as error the trial court's non-compliance with Ohio Criminal Rule 11(c)(2)(a). Petitioner has not shown that if counsel had filed a proper *Anders'* brief or had raised the alleged Criminal Rule 11(C)(2)(a) error on appeal, there is some probability that his conviction would have been reversed. Petitioner has made no allegations that he, in fact, did not understand the nature of the charge with which he was indicted. Rather, petitioner alleges prejudice because he was deprived of the opportunity to present this issue to the Court on direct appeal. However, the Ohio appellate courts had the opportunty to review the Criminal Rule 11(C)(2)(a) when ruling upon petitioner's motion for Reconsideration and Reinstatement of Appeal or, Alternatively, for a New Appeal. Furthermore, after thorough review of the record in the case at bar, this Court finds no absence of fundamental fair-ness in the trial court proceedings. *See, Lisenba v. California,* 314 U.S. 219, 236 (1941). Therefore, petitioner suffered no injury from any alleged deficiency on counsel's part.

Since petitioner has failed to show prejudice, this Court need not examine whether or not appellate counsel's performance was deficient. Petitioner has failed to establish the denial of effective assistance of counsel on appeal. Petitioner's first and second claims are without merit and therefore are DENIED.

WHEREUPON, the Court HOLDS that the petition is without merit and is therefore DENIED.

This action is hereby DISMISSED.

/s/ Joseph P. Kinneary

UNITED STATES DISTRICT JUDGE

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	TRIAL NO. B-831785
v.	:	MEMORANDUM
	:	DECISION AND
ALBERT FREELS,	:	JUDGMENT ENTRY.
Defendant-Appellant.	:	Filed April 4, 1984 [File stamp deleted]

Messrs. Arthur M. Ney, Jr., Seth Tieger, and Ms. Julie K. Wilson, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Albert J. Rodenberg, Jr., 3706 Cheviot Avenue, Cincinnati, Ohio 45211, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the accelerated calendar of this Court pursuant to App. R. 11.1 and Local Rule 12, and was submitted for decision upon the record from the Court of Common Pleas of Hamilton County, Ohio, and the briefs and arguments of counsel.

Counsel for the defendant-appellant, Albert Freels, has reported to this Court that a searching review of the record has revealed to him no errors in the proceedings below prejudicial to the rights of his client upon which any assignment of error may be predicated. Counsel has, therefore, requested this Court to review the record independently to determine whether the proceedings were free from prejudicial error and without infringement of the appellant's constitutional rights.

The record reflects that the appellant was properly charged in a single-count indictment, and that he entered a plea of no contest to the charge of felonious assault, *viz.*, having knowingly caused, or attempted to cause, physical harm to another by means of a deadly weapon, to-wit, a knife. After duly informing the appellant of his rights and accepting the plea, the court ordered that a presentence investigation be made. Thereafter, upon consideration of the report, the court imposed a term of imprisonment in harmony with law. We are convinced that there were no infirmities in the proceedings that led to the acceptance of the plea, and that the sentence fell within the boundaries of the law. It is, therefore, our conclusion that the record of the proceedings below contains no demonstrative evidence of error prejudicial to the appellant's rights.

The conviction from which this appeal is taken is hereby affirmed, and it is, therefore, the Order of this Court that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

KEEFE, P.J., SHANNON and KLUSMEIER, JJ.

EDITOR'S NOTE

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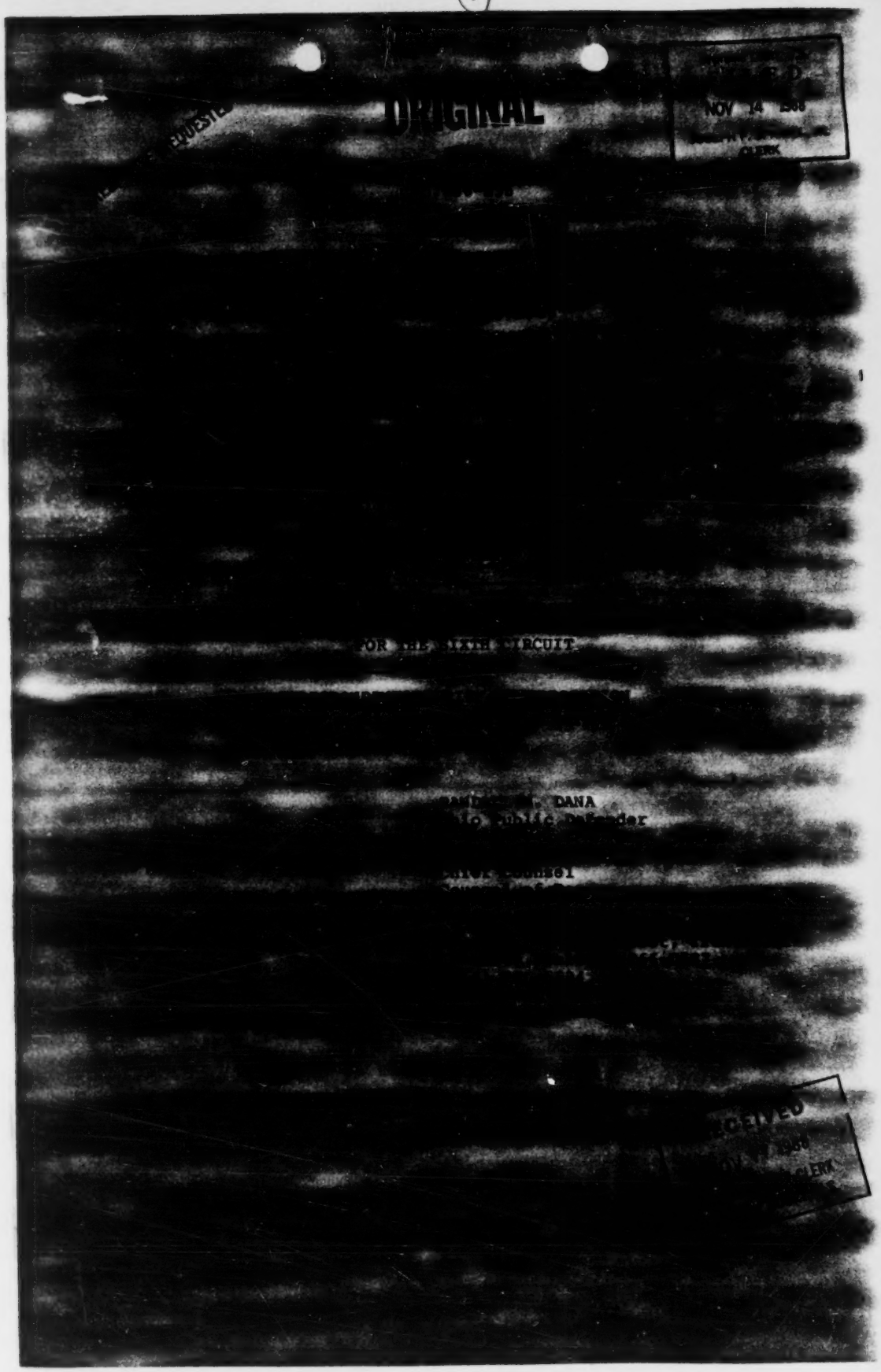

QUESTION PRESENTED

I. WHETHER PREJUDICE IS TO BE PRESUMED UNDER STRICKLAND v. WASHINGTON, 446 U.S. 668 (1984), AND UNITED STATES v. CRONIC, 466 U.S. 648 (1984), STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL WHEN APPELLATE COUNSEL CONCLUDES THE APPEAL LACKS MERIT BUT FAILS TO COMPLY WITH THE PROCEDURES REQUIRED BY ANDERS v. CALIFORNIA, 386 U.S. 738 (1967).

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No. 88-336

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

NORM F. HILLS, SUPT.,

Petitioner,

v.

ALBERT HUSTON FREELS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Albert Huston Freels, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 843 F. 2d 958 (6th Cir. 1988).

STATEMENT OF THE CASE

Respondent Freels (hereafter Freels) accepts petitioner's Statement of the Case subject to the following correction and addition. Petitioner states with respect to Freels' no contest plea hearing that the state trial judge asked Freels "if he understood the charge of felonious assault." Petition for Certiorari (hereafter Pet. for Cert.) 4. That is inaccurate. The court asked Freels if he understood that he had been indicted on the charge of felonious assault. [Trial Transcript (hereafter Tr.) 2]. In addition, the circuit court below found that the trial court "failed specifically to discuss the elements of

felonious assault with [Freels] as required by ... [Ohio Criminal] Rule [11(C)(2)(a)]." Pet for Cert. A-8.

PRELIMINARY STATEMENT

The Issue Presented By This Case Is Presently Before The Court In Penson v. Ohio, Case No. 87-6116.

This Court granted certiorari in **Penson v. Ohio**, No. 87-6116, on February 22, 1988. ___ U.S. ___, 98 L. Ed. 2d 977 (1988).[1] One of the issues before the Court in **Penson** is whether prejudice must be shown when counsel improperly withdraws from an appeal without filing a brief, after concluding the appeal is without merit. Thus, to the extent the issue presented herein is decided by this Court in **Penson**, a grant of certiorari for plenary review in this case is unnecessary to its resolution. The decision to grant or deny certiorari in this case should therefore be consistent with this Court's decision in **Penson**. In the event that the Court does not adjudicate the issue presented by this case, Freels submits this Court should deny certiorari for the following reasons.

REASONS FOR DENYING THE PETITION

1. The Court Below Correctly Decided That Prejudice Must Be Presumed When Appellate Counsel Fails To Substantially Comply With The Anders v. California, 386 U.S. 738 (1967), Procedures.

The Sixth Circuit's decision that prejudice is to be presumed when counsel fails to comply with the **Anders v. California**, 386 U.S. 738 (1967), procedures is consistent with the precedents of this Court. **Strickland v. Washington**, 466 U.S. 668, 692 (1984), and **United States v. Cronic**, 466 U.S. 648, 656-57, 659 (1984), expressly recognize that prejudice is to be

---

[1] The **Penson** case was orally argued on October 12, 1988, and is currently awaiting decision by this Court.

presumed when counsel is either denied or fails to meaningfully participate in the adversary process as an advocate. "[These] circumstances are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." **Strickland**, 466 U.S. at 692; **Cronic**, 466 U.S. at 659. That, of course, is what petitioner asks this Court to do in this case.

Petitioner does not contest the fact that Freels' counsel did not participate in the appellate adversary process as an advocate. As the Sixth Circuit recognized,

> As close as counsel's brief comes to advocacy is the unsupported representation that "upon careful review of the docket and transcript, [he] concludes that the trial court committed no error prejudicial to the defendant." In short, we are wholly unable to find that court-appointed counsel for Freels did more than or indeed even as much as was done by court-appointed counsel in **Anders**.

Pet. for Cert. A-14. For all practical purposes, Freels was effectively without counsel on appeal. Under **Strickland** and **Cronic** principles, prejudice is presumed.

Moreover, this Court has consistently required a new appeal without a showing of prejudice when the right to counsel has been denied, **Douglas v. California**, 372 U.S. 353 (1963), **Swenson v. Bosler**, 386 U.S. 258 (1967), or appellate counsel has failed to provide adequate or effective legal assistance, **Anders**, 386 U.S. at 738, **Evitts v. Lucey**, 469 U.S. 387 (1985). This is because the right to counsel is one of the "minimum safeguards" necessary to assure an adequate and effective appeal for indigent defendants. **Evitts**, 469 U.S. at 392.

Petitioner correctly recognizes that this Court in **Evitts** did not set specific standards for evaluating claims of ineffective assistance of appellate counsel. However, as the circuit court pointed out, this Court did indicate that appellate counsel

> "...must be available to assist in preparing and submitting a brief to the appellate

> court...and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. **See Anders v. California**, 386 U.S. 738 (1967); **see also Entsminger v. Iowa**, 386 U.S. 748 (1967)."

Id. at 393-94. Counsel's failure to meet these minimum requirements essentially waives the defendant's opportunity to make a case on the merits and is the equivalent of having no counsel. **Id.** at n. 6. Contrary to petitioner's assertion, see Pet. for Cert. 11, the **Evitts** Court, **id.** at 396-97, did recognize that **Anders** sets the minimum constitutional requirements for effective assistance on appeal:

> A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. This result is hardly novel. The petitioners in both **Anders v. California**, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), and **Entsminger v. Iowa**, 386 U.S. 748, 18 L. Ed. 2d 501, 87 S. Ct. 1402 (1967), claimed that, although represented in name by counsel, they had not received the type of assistance constitutionally required to render the appellate proceedings fair. In both cases, we agreed with the petitioners holding that **counsel's failure in Anders to submit a brief on appeal** and counsel's waiver in **Entsminger** of the petitioner's right to a full transcript **rendered the subsequent judgments against the petitioner unconstitutional.** (Emphasis added).

This Court's recent decision in **McCoy v. Court of Appeals of Wisconsin, District I**, ___ U.S. ___, 100 L. Ed. 2d 440 (1988), reaffirmed **Anders** requirements. The Court stated in **McCoy** that when appellate counsel represents the appeal is frivolous and seeks to withdraw, the court must make two determinations to satisfy federal constitutional concerns:

> "First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded the appeal is frivolous."

Id. at 455. This Court found that these critical determinations cannot be made on the mere statement by counsel that the appeal

is frivolous. **Id.** at 454. Thus, **McCoy** reaffirmed **Anders'** requirement that counsel's motion to withdraw be accompanied by "a brief referring to anything in the record that might arguably support the appeal. **Id.** That requirement was not met here.

Petitioner, on the other hand, suggests that **Anders'** well-established procedures, designed to protect the right to counsel, see **Pennsylvania v. Finley**, 481 U.S. ___, 95 L. Ed. 2d 539 (1987), can be overlooked where the record is "devoid of error." Petitioner's suggestion is unwise and constitutionally unsound. Whether the record is "devoid of error" is a determination that this Court has found cannot be reliably made without counsel's participation as an advocate and compliance with the **Anders** procedures. **Anders**, 386 U.S. at 745; **McCoy**, 100 L. Ed. 2d at 454. As the circuit court found:

> "...we believe that the absence of any evidence of advocacy in the role of appellate counsel presumptively places such a conclusion in serious doubt and vindicates the wisdom of **Anders**."

Pet. for Cert. A-17. If counsel's noncompliance with **Anders** can be deemed nonprejudicial, it would, as the lower court noted, see Pet. for Cert. A-18, "effectively eras[e] **Anders** from the books altogether." Assuming that the appellate courts will routinely enforce the **Anders** procedures, as petitioner contends, is simply naive. The circuit court recognized that **Freels'** case was not unique and that the **Anders** requirements are often ignored. Pet. for Cert. A-16.[2] Unless compliance with **Anders** is required, the right to counsel cannot be protected. **See Finley**, 95 L. Ed. 2d at 539.

In addition, a prejudice test would require courts reviewing claims of ineffective assistance of counsel to make subsequent

---

[2] For a more complete description of the Ohio appellate courts failure to require compliance with the **Anders** procedures, see Brief for Petitioner 42 n. 11 in **Penson v. Ohio**, No. 87-6116, **cert. granted**, ___ U.S. ___, 98 L. Ed. 2d 977 (February 22, 1988) and the **Amicus Curiae** Brief of the Ohio Association of Criminal Defense Lawyers In Support of Petitioner.

determinations as to whether the defendant was prejudiced by the denial of counsel. Such a rule would require the unnecessary expenditure of judicial resources to a situation where prejudice is "so likely." **Strickland**, 466 U.S. at 692. On the other hand, requiring a presumption of prejudice when counsel is effectively denied is an easy rule for the courts to follow. The violation is easy to identify and easy for the appellate court to prevent. **See Strickland**, 466 U.S. at 692. Finally, it accords the proper respect for the fundamental right to counsel which is essential to an adequate and effective appeal. **Evitts**, 469 U.S. at 392.

2. Respondent Freels Was Prejudiced By His Appellate Counsel's Failure To Raise On Appeal The Trial Court's Noncompliance With Ohio Criminal Rule 11(C)(2)(a).

Petitioner contends that "the circuit court did not find any error in the trial court's plea-taking procedures. Pet. for Cert. 13. That is inaccurate. The circuit court did not address this issue. The court made it clear that the only issue it considered was appellate counsel's failure to comply with the **Anders** procedures on appeal. Pet. for Cert. A-13. Indeed, the circuit court's only mention of the issue supports Freels' contention that Ohio Criminal Rule 11(C)(2)(a) was violated:

> "The record shows that while the trial judge did cover most of the requirements with Freels, he failed specifically to discuss the elements of felonious assault with defendant as required by the rule."

Pet. for Cert. A-8.

Moreover, there was a reasonable probability of success on appeal had counsel raised the issue of the trial court's noncompliance with Criminal Rule 11(C)(2)(a). Ohio Criminal Rule 11(C)(2)(a) requires that the trial court address the accused and determine that he is making the guilty or no-contest plea with an understanding of the nature of the charge. This understanding is constitutionally required. **Henderson v. Morgan**, 426 U.S. 637 (1976); **State v. Carter** (1970), 60 Ohio St. 2d 34, 37-38. Ohio

law further requires that the trial court record **affirmatively demonstrate** that the accused understood the nature of the charge. **State v. Billups** (1979), 57 Ohio St. 2d 31; **State v. Hawk** (1977), 55 Ohio App. 2d 231; **City of Garfield Heights v. Brewer** (1984), 17 Ohio App. 3d 216.

In this case, the trial court record does not demonstrate that Freels understood the nature of the charge. (Tr. 2-6). As indicated by the circuit court, the trial court did not discuss the nature or elements of the charge of felonious assault with Freels or inquire as to his understanding of the nature of the charge. Freels was only asked whether he understood that he was pleading no contest to felonious assault. (Tr. 2). No meaningful dialogue between the court and Freels occurred. **See State v. Wilson** (1978), 55 Ohio App. 2d 64, 65. (Meaningful dialogue with defendant required for compliance with Criminal Rule 11(C)(2) requirement that accused understand maximum penalties). Thus, the district court's finding, see District Court Order, attached in Appendix at A-1, that "the trial judge carefully questioned [Freels] about his understanding of the charge," was clearly erroneous.

The District Court further found that Freels signed a written plea agreement which stated that he was making the plea voluntarily and with an understanding of the nature of the charge. Appendix at A-2. However, Ohio courts do not presume compliance with Rule 11 from a written record. **Brewer**, 17 Ohio App. 3d at 217 (meaningful dialogue between court and defendant required; written statements will not satisfy requirements); **Wilson**, 55 Ohio App. 2d 64 (court is not in compliance with Criminal Rule 11(C)(2) when it fails to inform the defendant in oral dialogue of the maximum penalties of the offense to which he pleads guilty, even though the defendant signs a written plea of guilty); **State v. Misch** (June 27, 1984), Hamilton App. No. C830848, unreported, attached in Appendix at A-16 (defendant's

signature on a plea form is not sufficient for a waiver of defendant's rights); **State v. Hall** (January 27, 1981), Montgomery App. No. 6770, unreported, attached in Appendix at A-4 (advising accused of name of charge is not tantamount to explaining to him the nature of the charge; court will not presume from a silent record that the trial court has complied with Rule 11). Thus, there was a reasonable probability of success on appeal if this issue had been raised.

Furthermore, Freels' **pro se** brief in the Ohio Court of Appeals demonstrates that he did not understand the nature of the charge of felonious assault, Ohio Revised Code § 2903.11(A)(2), to which he entered a no contest plea. Ohio Revised Code § 2903.11 provides:

> (A) No person shall knowingly:
>
> (1) cause serious physical harm to another;
> (2) cause or attempt to cause physical harm to another my means of a deadly weapon or dangerous ordinance, as defined in Section 2935.01 of the Revised Code.

In Freels' **pro se** brief he asserted in Assignment of Error Number Three that the state failed to show that he caused serious physical harm to the victim, as required by Section 2903.11(A)(1). However, Freels was not charged under the (A)(1) section of the statute, but the (A)(2) section. Freels' statement in his **pro se** brief established that he did not really understand the essential nature of the charge to which he plead no contest.

Accordingly, Freels had a reasonable chance of success had counsel raised a violation of Ohio Criminal Rule 11(C)(2)(a) on appeal.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that a copy of the foregoing Respondent's Brief In Opposition was served on Petitioner Norm F. Hills, Supt., by forwarding a copy to the office of his counsel, Rita S. Eppler, Federal Litigation Chief, Ohio Attorney General's Office, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43266-0587 by U.S. mail this 14th day of November, 1988. I further certify that all parites required to be served have been served.

GREGORY L. AYERS
Counsel for Respondent

No. 88-336

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

NORM F. HILLS, SUPT.,

Petitioner,

v.

ALBERT HUSTON FREELS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

JUDGE ____
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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SOUTHERN DIST. OHIO
EAST'N DIV. COLUMBUS

ALBERT HUSTON FREELS

Petitioner

vs. Civil Action C-2-86-0279

ARTHUR TATE, Supt.

Respondent

ORDER

Petitioner Freels' August 7, 1986 motion to alter or amend judgment is DENIED.

When he entered his plea of no contest, the trial judge carefully questioned petitioner about his understanding of the charge and the rights he was giving up. Petitioner said that he understood what rights he was giving up and voluntarily made his decision to plead after carefully considering the advice of his counsel. The trial judge also told petitioner the maximum penalties and advised him of the effects of a plea of no contest.

The only arguable ground for an appeal petitioner advances is that the trial judge did not comply with Ohio Criminal Rule 11(c)(2)(a) which provides that the trial judge must:

> Determin[e] that he is making the plea voluntarily, with understanding of the nature of

> the charge and of the maximum penalty involved. ...

However, prior to the plea petitioner signed a written plea agreement which specifically advised him of the charge and the maximum penalties. The written plea also states that petitioner was making the plea voluntarily and with an understanding of the nature of the charge. Petitioner's attorney also signed the written plea. In open Court, petitioner acknowledged his written plea, and said he had read it and discussed it with his attorney before he signed it. He further stated that he understood all the rights the written plea agreement said he had, and that he understood what rights the written plea agreement said he was giving up. Petitioner's attorney also stated in open court that petitioner was intelligently and understandingly entering his plea. Thus, petitioner had no arguable claim to set aside his plea of no contest.

United States District Judge

OHIO REVISED CODE

§ 2903.11. Felonious assault.

(A) No person shall knowingly:

(1) Cause serious physical harm to another;

(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of felonious assault, an aggravated felony of the second degree. If the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, felonious assault is an aggravated felony of the first degree.

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. : CASE NO. 6770

JAMES HALL, JR. :

Defendant-Appellant :

3d District

.....

O P I N I O N

Rendered on the 27th day of January, 1981

.....

LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio, BY: GARY W. CRIM, Assistant Prosecuting Attorney, Suite 300, 41 North Perry Street, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

DOUGLAS R. SHAEFFER, Attorney at Law, 1406 Hulman Building, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

ZIEGEL, P.J. (By Assignment)

Defendant was indicted for two counts of aggravated robbery (with deadly weapon) and one count of probationable aggravated burglary. After plea bargaining, with the consent of the court, the prosecution nolled the first count of the indictment (aggravated robbery with deadly weapon) and struck the deadly weapon specification from the second count, thus making that charge probationable. The Defendant then entered a plea of no contest to the charges of probationable aggravated robbery and probationable aggravated burglary. After receiving a pre-sentence investigation report, the trial court sentenced the Defendant to serve a term of not less

than four years nor more than twenty-five years on the charge of aggravated robbery and a term of not less than seven years nor more than twenty-five years on the charge of aggravated burglary, said sentences to be served consecutively. In due time, Defendant appealed this sentencing.

Subsequently, Defendant moved for shock probation, which was denied without hearing, and thereafter Defendant was granted leave to join his appeal from the overruling of his motion for shock probation to the basic appeal from the sentence he received.

For his first assignment of error Defendant claims that:

> "The court erred by accepting the Defendant's pleas of no contest...without first addressing the Defendant personally and determining that the Defendant was making the pleas voluntarily, knowingly, and intelligently, with the understanding of the nature of these charges and the consequences and effect of his pleas upon findings of guilty and that he was not eligible for probation, all contrary to Crim. R. 11(C)(2)(a) & (b)..."

The requirements of the Ohio Rules of Criminal Procedure concerning pleas of no contest are set forth in Rule 11(C)(2):

> "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:
>
> (a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.
>
> (b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

> (c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself."

Defendant admits that the trial court complied fully with Crim. R. 11(C)(2)(c), but contends that it failed to comply with Crim. R. 11(C)(2)(a) & (b), first, by failing to address the Defendant personally and determining that the defendant understood the nature of the charge of aggravated robbery and the nature of the charge of aggravated burglary.

The arraignment took place on January 18, 1980, and we have before us the transcribed record of that proceedings, consisting of 16½ pages. The record establishes that the Defendant was present during the entire proceedings. At the beginning the assistant prosecuting attorney introducing the case advised the court that Defendant had been indicted for aggravated robbery and aggravated burglary, and Defendant's counsel joined in the introductory remarks with reference to preliminary plea bargaining. It is clear, therefore, that Defendant knew that he was charged with aggravated robbery and aggravated burglary.

Further on in the record reference is made to these charges, first when the Waiver and Plea form was given to Defendant to sign (R-6):

BY THE COURT

Q Now, I want you to read it and explain it to the Court as you go along.

A "I have been advised by the Court --

THE COURT: You can help him.

THE DEFENDANT: "By the Court that I am pleading no contest to the offense of aggravated robbery, two counts --

Mr. Shaeffer: Count Two.

THE DEFENDANT: "Count Two, delete handgun, and aggravated burglary and that the maximum penalty which may be imposed is confinement in a penal institution for a term of 50 years or a fine of $25,000 --

MR. SCHAEFFER: And a fine of $20,000. Do you understand the word confinement, James?

THE DEFENDANT: Right.

At R-7a, Defendant's counsel questioned him:

MR. SCHAEFFER: In effect, if the Judge were to find you guilty, having tendered a plea of no contest, it would be four, five, six, or seven years as a minimum term to 25 years as a maximum term on the aggravated robbery, to be served concurrently with four, five, six, or seven years as a minimum term and 25 years maximum term on the aggravated burglary charge.

THE DEFENDANT: Right.

At R-8, the court was continuing the questioning:

Q In accordance with plea negotiations, by dropping a handgun with respect to one count of robbery, the Court will consider you for probation. But, you understand, do you not, that probation is kind of a touch and go situation where you have got several offenses?

A Right.

At R-9 Defendant's counsel was again involved in the questioning:

MR. SCHAEFFER: Your Honor, may I ask one other question,

THE COURT: Yes. Go ahead.

MR. SCHAEFFER: James, we discussed by tendering a plea of no contest, in the event the Judge were to find you guilty of the aggravated robbery charge as amended and the aggravated burglary charge that he could consider, one, probation; two, probation with a condition of six months in the workhouse.

THE COURT: That is called a split sentence.

At R-12, with the Defendant still reading from the Waiver Form, the following transpired:

A "Face those who accuse me of this crime."

Q Somebody had you arrested for these robbery charges, and you have a right to see those people in open court and subject them to the cross examination of your lawyer, if we try the case.

MR. SCHAEFFER: Your Honor, if it please the Court. Do you know the name of the sole complaining witness in the aggravated robbery case, having discussed his name with me during the course of our discussions?

THE DEFENDANT: Yes.

MR. SCHAEFFER: What is his name?

THE DEFENDANT: Beam.

MR. SCHAEFFER: Do you know the name of the chief complaining witness in the aggravated burglary charge as a result of discussing the same with me?

THE DEFENDANT: Yes, Sammons.

The foregoing excerpts from the record comprise all of the references made to aggravated robbery and aggravated burglary during the proceedings wherein Defendant entered his no contest plea. At the close, the trial judge gave the following summary:

THE COURT: It appears to the Court that the Defendant has signed his change of plea in the presence of his attorney, the prosecuting attorney and the Court. It appears to the Court that he seems to have full and complete understanding of the nature of this plea, that is, the no contest plea, and that the Court may find him either guilty or not guilty; and in the event the Court should

> find him guilty based upon the evidence that is presented by the State, then he understands the maximum penalties provided by law; the difference between consecutive and concurrent terms; his eligibility for consideration for probation; he understands the meaning of aggravated robbery and aggravated burglary; and the fact that a gun has been deleted from the second count of the aggravated robbery charge...

While the trial court specifically found that the Defendant "understands the meaning of aggravated robbery and aggravated burglary," the question still remains as to whether the record demonstrates that understanding. It will not be presumed from a silent record that the trial court has complied with Rule requirements. An appellant meets his burden of demonstrating error by ordering a transcript of the proceedings which do not contain an explanation of his rights. State v. Boerst, 45 Ohio App. 2d 240, 74 Ohio Opns 2d 350, 343 N.E. 2d 853 (1975).

In Henderson v. Morgan, 426 U.S. 637, 49 L. Ed. 2d 108 (1976), the defendant pleaded guilty upon advise of counsel to a charge of second degree murder and was convicted upon that charge. After exhausting his state remedies he brought habeas corpus in the Federal District Court, alleging that his plea was not voluntary because he was not aware that intent to cause death was an element of the offense. At first, the District Court, on the basis of the state court record, denied relief, but the court of appeals summarily reversed and directed the District Court to conduct an evidentiary hearing on the subject. At this subsequent hearing that court found that the respondent "was not advised by counsel or the court, at any time, that an intent to cause death or a design to effect the death of the victim was an essential element

of Murder 2nd Degree." In affirming the granting of the writ, the Supreme Court of the United States held, as stated in par. 3 of the headnotes:

> "A criminal defendant's plea of guilty may be involuntary either because he does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt; without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense."

A similar situation was presented to the Court of Appeals for Franklin County in State v. Hawk, 55 Ohio App. 2d 231, 9 Ohio Opns 3d 378, 380 N.E. 2d 736 (1977), wherein the majority held, per par. 1 of the syllabus:

> "The failure of a trial court to make an oral inquiry with regard to whether an accused entered a plea of guilty to the offense of murder 'with an understanding of the nature of the charge' is reversible error. (State v. Caudill, 48 Ohio St. 2d 342, followed.)"

In that case, as in the case at bar, the record established that the trial court did in fact advise the defendant that he was entering a plea "to the stipulated lesser included offense of murder". There, as here, it was "quite apparent that the trial court did not make inquiries to determine whether defendant entered his plea of guilty...'with understanding of the nature of the charge'". Op. cit., 55 Ohio App. 2d @ 234.

A dissent in State v. Hawk, supra, emphasized the holding in State v. Stewart, 51 Ohio St. 2d 86, 364 N.E. 2d 1163 (1977), wherein it was held that "although it can be argued that the trial

court should adhere scrupulously to the provisions of Crim R. 11(C)(2) (State v. Caudill (1976), 48 Ohio St. 2d 342), there must be some showing of prejudicial effect before a guilty plea may be vacated." Here, the state's brief has also called our attention to that case. That case, however, dealt with the trial court's failure to advise the defendant that under the charge to which he had tendered a plea of guilty he was not eligible for probation.

The basic case with regard to the care required to be exercised by a trial court in the acceptance of a plea of guilty or of no contest is State v. Caudill, 48 Ohio St. 2d 342, wherein the Supreme Court held in the syllabus:

> "1. In accepting a written plea of no contest to a felony charge, the trial court must adhere scrupulously to the provisions of Crim. R. 11(C)(2).
>
> "2. Adherence to the provisions of Crim. R. 11(C)(2) required an oral dialogue between the trial court and the defendant which enables the court to determine fully the defendant's understanding of the consequences of his plea of guilty or no contest.
>
> "3. The requirements of Crim. R. 11(C)(2) are not satisfied by a written statement by the defendant or by representations of counsel."

State v. Hawk, supra, (wherein a motion for leave to appeal was overruled, March 17, 1978) recognized that State v. Stewart, supra, modified the first, but not the second and third paragraphs of the syllabus of Caudill, but held that omissions of compliance with Crim. R. 11 with regard to defendant's understanding of the nature of the charge against him remains unmodified by Stewart, and further held that it would be improper for that court to extend Stewart as to further modify the syllabus of Caudill.

Subsequent to Hawk and Stewart, the Supreme Court further relaxed the requirements of Caudill in State v. Strawther, 56 Ohio St. 2d 298, 383 N.E. 2d 900 (1978), and in State v. Billups, 57 Ohio St. 2d 31, 385 N.E. 2d 1308 (1979). Strawther involved the failure of the trial court orally to advise the defendant that he had a right to compulsory process to obtain witnesses in his behalf, and the Supreme Court held that in the absence of prejudicial effect such omission does not constitute prejudicial error. In Billups the trial court omitted some of the required colloquy because the defendant acknowledged that he had heard and understood the court's earlier colloquy with a previous defendant, which procedure was held to be a substantial compliance with the Rule. Billups did specifically point out that the trial court did conduct a discussion with the defendant apprising him of the nature of the charges.

From our examination of the record we conclude that in the case before us prior to the court accepting Defendant's no contest plea the court did not engage in any dialogue with the Defendant "determining that he is making the plea voluntarily, with understanding of the nature of the charge." We hold that advising a defendant of the name of the charge set forth in the indictment is not tantamount to explaining to him the nature of the charge. In accordance with the holding in Henderson v. Morgan, supra, we conclude that unless the record establishes that a pleading defendant understood the nature of the charge against him, he cannot be said to have pleaded guilty or no contest to that charge voluntarily. We further reject the prosecution's argument

that the Stewart, Strawther, and Billups limitations on the Caudill rule can be extended to determination that there is substantial compliance with Crim. R. 11(C)(2) where the record fails to establish that the defendant understood the "nature of the charge" against him. The first part of Defendant's first assignment of error is accordingly held to be well taken.

The second part of Defendant's first assignment of error asserts that the trial court erred in accepting his no contest plea for the reason that he did not understand that he was not eligible for probation. In order to so advise a defendant at a plea, the trial judge would have to have a presentence report before him. In the case sub-judice there was no need for a presentence report prior to the finding of guilty. Under these circumstances the trial court is not required to inform a defendant that he is not eligible for probation prior to a plea. State v. Woods, 48 Ohio App. 2d 339, 357 N.E. 2d 1106 (1976). This part of Defendant's first assignment of error is not well taken.

In his second assignment of error, Defendant asserts that the trial court erred in failing to grant him probation and shock probation solely by reason of its determination that he was a "repeat offender" without granting him a meaningful hearing to rebut such determination. It is noted that under Crim. R. 11(B)(3) when a plea of no contest is accepted, unless the charge is one of aggravated murder, the court shall proceed with the sentencing under Rule 32. Under Crim. R. 32.2 a presentence report is required only before the court grants probation. Since the trial court had no legal obligation to require a presentence report

before sentencing Defendant, there can be no requirement that a defendant be permitted to offer testimony to rebut anything that might be contained in any presentence report which the court might examine prior to sentencing.

Defendant's third assignment of error raises the same question with regard to his motion for shock probation. In this situation he sought a formal hearing regarding that motion "for the purpose of submitting relevant and material evidence to rebut any previous determination by the Court that the Defendant is a repeat offender..." He does admit, however, that there is no clear statutory expression in Section 2947.061, Revised Code, conferring upon him the right to a hearing on his motion for shock probation. State v. Poffenbaugh, 14 Ohio App. 2d 59 (1968). In view of the state of the record here we need not comment on the due process argument Defendant advances. The trial court did not state that he sentenced Defendant to confinement solely because he found him to be a repeat offender. The sentence in our case had been announced and the prosecutor had called up the next case before the judge added, almost as an afterthought, that he found the Defendant to be a repeat offender. Defendant's second and third assignments of error are therefore overruled.

Since we have sustained Defendant's first assignment of error and have determined that, since the record did not establish that the Defendant knew the nature of the offenses with which he was charged, his plea of no contest cannot be considered to have been voluntarily given, this case will be reversed and remanded to the

common pleas court for further proceedings in accordance with law in order to afford the Defendant an opportunity to reconsider his plea.

.....

SHERER and CRAMER, JJ., concur.

(Judge Paul Sherer, Retired from the Court of Appeals, Second Appellate District, Judge Fred B. Cramer, Retired from the Butler County Common Pleas Court and Judge Donald L. Ziegel, Retired from the Preble County Common Pleas Court, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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APPENDIX A

THE SUPREME COURT LAW LIBRARY

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-830848 TRIAL NO. B-832567
Plaintiff-Appellee,	:	
vs.	:	O P I N I O N.
ANTHONY J. MISCH,	:	
Defendant-Appellant.	:	

FILED
COURT OF APPEALS
JUN 27 1984
CLERK OF COURTS

Criminal Appeal from Court of Common Pleas

Judgment appealed from is: Reversed and Remanded

Date of Judgment entry on Appeal: June 27, 1984

Messrs. Arthur M. Ney, Jr., and Christian J. Schaefer, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Dennis E. Halaby, 615 Main Street, Second Floor, Cincinnati, Ohio 45202, for Defendant-Appellant.

BLACK, J.

Defendant pleaded guilty to theft and was sentenced to one year in the Ohio Penitentiary after a pre-sentence investigation. Defendant presents two assignments of error: (1) that the trial court erred in accepting his guilty plea, because the court failed to comply with Crim. R. 11(C)(2); and (2) that defendant was promised a split sentence which he did not receive. We sustain defendant's first assignment of error and overrule his second.

In his first assignment of error defendant contends that the trial court failed to inform him of the following: what was the effect of his guilty plea, that the trial court upon acceptance of his plea could proceed with judgment and sentence, and that he could not be compelled to testify against himself. Crim. R. 11(C)(2) requires that defendant be informed of each of these before his guilty plea may be accepted.[1]

The Ohio Supreme Court set forth in *State v. Ballard* (1981), 66 Ohio St. 2d 473, 423 N.E.2d 115, two tests to be used to determine whether the trial court complied with Crim. R. 11(C)(2). One test is to be used with the four constitutional rights enumerated in Crim. R. 11(C)(2)(c),[2] and the other test is to be used with all the other elements of Crim. R. 11(C)(2). When dealing with the nonconstitutional elements of Crim. R. 11(C)(2), the trial court need only "substantially comply" with the rule and defendant must show that any error was prejudicial. *Ballard*,

supra at 475, 423 N.E.2d at 117, *citing, State v. Stewart* (1977), 51 Ohio St. 2d 86, 364 N.E.2d 1163. A stricter standard is mandated for the four constitutional rights listed in Crim. R. 11(C)(2)(c), and this requires the court to inform defendant with greater care and completeness that he is waiving these rights, although the exact language of Crim. R. 11(C) need not be used. *Ballard, supra* at 477-78, 423 N.E.2d at 118-19.

The failure to inform defendant about the effect of his guilty plea, or about proceeding immediately to judgment and sentence, involves nonconstitutional rights. The less strict, substantial compliance/prejudice test must be applied to determine whether the court complied with Crim. R. 11(C)(2). A complete reading of the record indicates that defendant did understand the effect of his guilty plea. Defendant realized that his plea was an admission of guilt, because he was informed that his plea relieved the state from proving him guilty. Defendant admitted to the trial court that he must have been crazy to steal the stuffed animal. Defendant was sufficiently informed of the effect of his plea and the record does not demonstrate that he was prejudiced. Defendant is correct that the trial court did not specifically inform him that the court could proceed immediately to judgment and sentence, but defendant was not prejudiced, because the court did not immediately proceed to judgment and sentence. It ordered a pre-sentence investigation. *State v. Thomas* (May 14, 1980), Hamilton App. No. C-789456, unreported;

State v. Brown (Nov. 1, 1978), Hamilton App. Nos. C-780055, C-780056, unreported.

Defendant's complaint that the trial court did not inform him of his privilege against self-incrimination involves a constitutional right requiring the stricter standard set forth in *Ballard*. The Supreme Court stated in *Ballard, supra* at 480, 423 N.E.2d at 120, that defendant must be "meaningly informed" of his privilege against self-incrimination, and that the test is "whether the trial court explained or referred to the right in a manner reasonably intelligible to the defendant." In the instant case, the court completely failed to inform defendant of his privilege. The prosecution notes that defendant had signed a written plea that stated that he waived his constitutional right to a trial at which he could not be compelled to testify against himself. We hold that while this written waiver may satify the lesser substantial compliance/prejudice test, it does not meet the stricter test required for the four constitutional rights set apart in *Ballard*. Crim. R. 11(C)(2) requires that defendant be addressed personally and be informed of his right to "a trial at which he cannot be forced to testify against himself," and we interpret *Ballard* to require more than a written waiver of this privilege.[3]

In his second assignment of error defense counsel attaches a letter from defendant which alleges that defendant was promised a split sentence which he did not receive. As there is no evidence

on the record of the alleged plea bargain, defendant's second assignment of error is overruled. *Lamar v. Marburry* (1982), 69 Ohio St. 2d 274, 431 N.E.2d 1028.

Because defendant was not "meaningfully informed" of his privilege against self-incrimination, this case is reversed and remanded for further proceedings.

SHANNON, P. J., and PALMER, J., CONCUR.

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1. Crim. R. 11(C)(2) reads in part:

> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:
>
> * * *
>
> (b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.
>
> (c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself. (emphasis added)

2. These four constitutional rights are: the privilege against compulsory self-incrimination, the right to a jury trial, the right to confront accusors, and the right of compulsory process. The first three rights are referred to as "*Boykin* rights." *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S. Ct. 1709, held that waiver of these rights cannot be presumed from a silent record.

3. The Ohio Supreme Court in *State v. Strawther* (1978), 56 Ohio St. 2d 298, 383 N.E.2d 900, held that a written guilty plea in which defendant waived his right to compulsory process was enought to show substantial compliance with Crim. R. 11(C)(2) when defendant could not demonstrate prejudice. *Strawther* was decided prior to *Ballard* and used the substantial compliance/prejudice test set forth in *Stewart, supra*. We believe that *Ballard, supra*, rejected this test for the four constitutional rights listed in Crim. R. 11(C)(2)(c), and that *Strawther* does not control what the trial court must do when it informs the defendant and determines that he understands that he is waiving the four constitutional rights.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 88-336

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NORM F. HILLS, SUPT.,

Petitioner,

v.

ALBERT HUSTON FREELS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF OF SUPPLEMENTAL AUTHORITY

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CASE NO. 88-336

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NORM F. HILLS, SUPT.,

Petitioner,

v.

ALBERT HUSTON FREELS,

Respondent.

PETITIONER'S BRIEF OF SUPPLEMENTAL AUTHORITY

On August 22, 1988 Petitioner Norm F. Hills, Superintendent of the Pickaway Correctional Institution at Orient, Ohio, filed a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in *Freels v. Hills,* 843 F.2d 958 (6th Cir. 1988). On October 19, 1988 the Court directed Respondent to file a response. After Petitioner filed his petition, the United States Court of Appeals for the Eighth Circuit rendered a decision in direct conflict with the Sixth Circuit's decision in *Freels v. Hills,* 843 F.2d 958 (6th Cir. 1988). Petitioner hereby submits the September 12, 1988 decision of the Eighth Circuit in *Sanders v. Clarke,* 856 F.2d 1134 (8th Cir. 1988), in further support of his petition for writ of certiorari.

In *Freels v. Hills,* 843 F.2d 958 (6th Cir. 1988), the Sixth Circuit held that the failure of a defendant's appellate counsel to strictly conform to the requirements for filing an appellate brief set forth in *Anders v. California,* 386 U.S. 738 (1967), must be deemed presumptively prejudicial and is not to be measured by the deficiency-prejudice standards of

Strickland v. Washington, 466 U.S. 668 (1984). In *Sanders v. Clarke,* 856 F.2d 1134 (8th Circuit 1988), the Eighth Circuit addressed the same issue that faced the Sixth Circuit in *Freels v. Hills*: whether the standards for ineffective assistance of counsel set forth in *Strickland v. Washington* apply where appellate counsel did not comply with the procedures established in *Anders v. California. Sanders v. Clarke,* 856 U.S. at 1134. In its discussion of this issue the Eighth Circuit explicitly considered and rejected the holding of the Sixth Circuit in *Freels v. Hills. Sanders,* 856 U.S. at 1138. The Eighth Circuit held that a defendant must show prejudice to prove ineffective assistance of counsel where a nonconforming *Anders* brief is filed. *Sanders,* 856 F.2d at 1137-38.

The Eighth Circuit found that its holding was consistent with its decision in *Robinson v. Black,* 812 F.2d 1084 (8th Cir. 1987), *petition for cert. filed,* 56 U.S.L.W. 3198 (U.S. Sept. 29, 1987) (No. 87-211). In *Robinson* the Eighth Circuit had found that appellate counsel had not complied with *Anders* because counsel had included in his brief a discussion of why the defendant's claims were without merit and had not acted as an advocate for his client, the defendant. *Robinson,* 812 F.2d at 1086. In *Sanders v. Clarke* the Court noted that "a searching inquiry into potential prejudice was in fact made" by the Court in *Robinson. Sanders,* 856 U.S. at 1137. The Court concluded that "*Robinson* can be read as consistent with requiring a showing of prejudice before finding ineffective assistance of counsel in the *Anders* context." *Id.*

In holding that the prejudice standard of *Strickland* applies in the *Anders* context the Eighth Circuit found that noncompliance with *Anders* does not involve a situation in which the reliability of the fact-finding process is undermined or in which the degree of prejudice is impossible to determine. *Sanders,* 856 U.S. at 1138. The court noted that this Court had stated in *United States v. Cronic,* 466 U.S. 648, 659 n.26 (1984), that prejudice is presumed only where counsel's conduct has some affect on the reliability of the finding of guilt. *Id.* The Eighth Circuit found, unlike the Sixth Circuit,

that the *Anders* procedures need not be eroded by applying the *Strickland* prejudice requirement. *Id.* Finally, the court found that, since a noncomplying *Anders* brief may have correctly concluded that an appeal was without merit, it is more logical and efficient — both for the state courts and for the federal habeas courts — for the federal courts to inquire into the adequacy of the *Anders* brief and the merits of the appeal.

The reasoning of the Eighth Circuit in *Sanders v. Clarke* coincides with and supports Petitioner's argument in support of this Court's granting certiorari to review the decision of the Sixth Circuit in *Freels v. Hills.* Petitioner again respectfully submits that a writ of certiorari should be issued to review the decision of the Sixth Circuit and to address the questions presented in the petition previously filed with this Court.

Respectfully submitted,

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